IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 34.

WORCESTER COUNTY TRUST COMPANY, Executor,
Petitioner,

v.

RAY L. RILEY, Controller of the State of California, ET AL.,
Respondents,

IN THE MATTER OF THE MOTION OF THE PETITIONER TO SUBSTITUTE HARRY B. RILEY, CONTROLLER OF THE STATE OF CALIFORNIA, AS A PARTY RESPONDENT.

MEMORANDUM OF HARRY B. RILEY, CONTROLLER, IN OPPOSITION.

HARRY B. RILEY,
Individually and as Controller of the State of California, appearing specially, only, as aforesaid, by his Attorneys,
NORMAN W. BINGHAM, JR.,
GEORGE S. FULLER.

L. H. LANE, Law Printer, 221 High Street, Boston.

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IN THE MATTER OF THE MOTION OF THE PETITIONER TO SUBSTITUTE HARRY B. RILEY, CONTROLLER OF THE STATE OF CALIFORNIA, AS A PARTY RESPONDENT.

MEMORANDUM OF HARRY B. RILEY, CONTROLLER, IN OPPOSITION.

Now comes Harry B. Riley, Controller of the State of California, appearing specially only, but not generally, and without submitting himself generally to the jurisdiction of the court, but for the sole purpose of objecting to the jurisdiction of the court over him or to grant the petitioner's motion to substitute him as a party respondent in the above entitled cause, and submits the following memorandum in opposition to such motion. (All italics in this Memorandum ~~is~~ are ours.)

The executor's Memorandum in support of its motion states that its interpleader bill alleged threatened collection of both Massachusetts and California inheritance

taxes, each based upon inconsistent claims of domicile. The allegation as to the California respondents was,—

> ". . . that the respondents, Ray L. Riley, comptroller as aforesaid, W. H. H. Gentry, inheritance tax attorney as aforesaid, and Frank P. Sproul, inheritance tax appraiser as aforesaid, have each severally or as agent one for another, individually or by their agent or agents, *determined that the said Robert H. Hunt died domiciled* in California and *are asserting* and have *threatened* and are *about to assess and attempt to collect* from your complainant and the estate in its charge" such taxes "based upon said domicile or determination of domicile . . ." (R. 4); and that "the threatened collection of both the California and the Massachusetts taxes, each based upon an inconsistent claim of domicile, will deprive your complainant and the Estate in its charge of property without due process of law . . ." (R. 5).

This allegation must, however, be read in the light of the California statutes and law as to the functions and powers of these officials. As pointed out in the California respondents' Brief in Opposition to the Petition for Certiorari (Resp. Brief, pp. 6–8) it is no part of the functions or powers of any of these officials to determine the decedent's domicile or to assess or collect the tax.

The entire matter of determining and fixing the tax liability of the estate is a court proceeding which began, in the Hunt estate, with the appointment of Sproul as Inheritance Tax Appraiser* by the Superior Court in

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* Each county has one or more Inheritance Tax Appraisers who are appointed as such by the State Controller, just as Masters in Chancery are appointed by the Governor in Massachusetts, their duties being to act in a particular case when appointed by the court in such case. (Sec. 14.)

which the probate proceedings were had. His only function is to act as an officer of the court with the powers of a referee and examine into the facts and make his determination as to the amount of the tax. After this report is filed in the court the Controller and all other persons interested are notified, and if any objections are filed the matter is set down for hearing before the court, at which the report is treated as prima facie evidence, like an auditor's report. The Inheritance Tax Attorney is merely the official attorney for the Controller and would represent the Controller at such hearing. After hearing, the court makes its order fixing the tax, which order has the force and effect of a judgment in a civil action with all rights of appeal. When the court's judgment has become final, it is then the duty of the County Treasurer to collect the tax and pay the same to the State Treasurer. (The pertinent California statutes are set forth in the Appendix to the California Respondents' Brief in Opposition to the Petition for Certiorari.)

It thus appears that the allegation that the California respondents have determined that Hunt died domiciled in California amounts to nothing more than an assertion that they have come to that conclusion in their own mind, and not that there has been any official determination of domicile; and that the allegation that they are threatening and are about to assess and attempt to collect the tax amounts to nothing more than an assertion that in the pending court proceedings they will, when the time comes, contend that the *court* should determine the domicile to be in California and that the *court* should fix the tax accordingly. At no time will any of them

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After having been so appointed by the court, obviously such Inheritance Tax Appraiser is no longer under the control or direction of the State Controller so far as that case is concerned, but is an officer of the court for the purpose of that case.

have anything to do with the collection of the tax pursuant to the court's judgment.

This examination and analysis of the California law, in the light of which the petitioner's allegations must be read, are important in the consideration of the petitioner's present motion to substitute the new Controller. It makes it clear that, in seeking to have the new Controller now substituted in the place of his enjoined predecessor in office, Ray L. Riley, the executor is seeking the action of this Court to bring under injunction a state officer whose function in connection with the present tax proceeding in California will not begin until some time in the future after the Inheritance Tax Appraiser, now under injunction, has filed his report in the California court, and whose only function then will be to represent the State in pressing before that court the State's contentions with respect to domicile* and the amount of the tax liability; and that it is seeking to have this Court further interfere to render a state officer unable to perform his statutory duty, when the time for its performance shall arrive, in a tax determinative or assessment proceeding in which the executor will be entitled to a full and fair hearing. It is not a mere formality.

This Court has many times said that due process is satisfied if its usual requisites, the right to a full and fair hearing of its claim, are present at any stage of a tax proceeding. In *Pittsburgh etc. Ry. Co.* v. *Board of Public Works,* 172 U. S. 32, 45, this Court said that "in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assess-

* It is to be borne in mind, however, that the interpleader bill contains no allegation that the decedent was not domiciled in California, or that he was domiciled in Massachusetts or elsewhere than California. As we understand the theory of the executor's suit is that it is taking no position on that point so far as this suit is concerned.

ment, at some stage of the proceedings." It is immaterial, therefore, for our present purpose, whether the California court be considered to be acting as a judicial tribunal or as an administrative agency in performing its function of fixing or assessing the tax. See *DePauw University* v. *Brunk*, 53 F. (2) 647; affirmed *per curiam*, 285 U. S. 527.

It is well settled that this Court will not interfere to stop officers of this kind, particularly in tax proceedings, from performing their statutory duty for fear they may perform it wrongfully. *First National Bank* v. *Albright*, 208 U. S. 548; *Dalton Adding Machine Co.* v. *State Corporation Commission*, 236 U. S. 699. A fortiori a state officer whose only function will be to press the contentions of the State before that assessing body sometime in the future should not be enjoined.

As in the *Dalton* case, it is not contended by the executor that the California tax statute is unconstitutional, but it is alleged only that it is feared that it might be enforced in such a way as to contravene the Fourteenth Amendment. If such a thing happened, it could take an appeal to the upper courts of the state, and could then take the case to this Court on a proper showing. There is nothing to indicate that it would not have a fair hearing or that the California respondents would attempt to enforce the law against it in an oppressive manner.

It is also well settled that the federal court has no jurisdiction to enjoin the collection of state taxes alleged to violate the Federal Constitution or laws when the plaintiff has not exhausted the state administrative remedies. *First National Bank* v. *Weld County*, 264 U. S. 450; *Gorham Mfg. Co.* v. *Tax Commission*, 266 U. S. 265.

So far we have been answering the petitioner in the same vein in which it has presented and argued its motion, *i. e.*, as if it were merely an injunction suit,—as

if it were a bill to enjoin the threatened collection of a tax alleged to be unconstitutional. As a matter of fact, *it is an entirely different kind of a proceeding and is governed by entirely different equitable principles.* Failure to note and give due consideration to this fact has resulted in great confusion of thought on the part of the executor and of the District Court.

The executor's suit is based solely on the Federal Interpleader Act (so-called) (sec. 24 (26) of the Judicial Code, (28 U. S. Code § 41 (26)) as amended January 20, 1936 (49 Stat. 1096). *It is an interpleader suit.* It is a bill to determine which of two parties is entitled to an obligation. The obligation is the inheritance tax obligation of the decedent's estate to the state. The petitioner is in doubt as to which of two states is entitled to that obligation. It seeks by this interpleader suit to have the District Court resolve that doubt and "*discharge* the complainant from further liability". (See sub-paragraph (d) of the Act. R. 8.)

The purpose of interpleader is not to prevent the doing of an unauthorized act, but to require an authorized act to be done in one court rather than in another.

It would seem perfectly clear that the states were indispensable parties defendant in such an interpleader suit. It is not only obvious, but the Act expressly provides, that the parties interpleaded must be the adverse claimants who are "claiming to be entitled to" the obligation. The inheritance tax obligation, at least in California, and in most other states, is an obligation to the state, and only the state itself can be entitled to that obligation. As the sole purpose of interpleader is to enable the plaintiff by one suit and judgment to be discharged of an obligation, and to bring before the court the several parties who *claim to be entitled* to that obligation, it follows that the bill must name as respondents

each party who would *be entitled* to that obligation if his or its contention prevailed.

In the case at bar the principal issue sought to be raised by the executor by its interpleader bill is the issue of fact as to the decedent's domicile. If the domicile was in California, the State of California is entitled to the tax obligation with respect to the intangible personal property. If the domicile was in Massachusetts, that State is entitled to that obligation. Obviously, then, the executor must interplead the two states in order to enable the court to discharge it from all further liability for its obligation.

Recognizing that it could not interplead the states themselves (Eleventh Amendment), or the tax officials as the agents and representatives of their respective states (*Missouri* v. *Fiske,* 290 U. S. 18; *Ex parte State of New York No. 1,* 256 U. S. 490), the executor has, up to now, been maintaining that its suit is against the named officials individually and not in their official capacity, that because of their alleged threats they were "stripped of (their) official or representative character" (*Ex parte Young,* 209 U. S. 123, 160), and that therefore they could be interpleaded as individuals and not as state officials representing their states. (See page 12 of its Petition for Certiorari.)

At the bottom of page 3 of its Memorandum the executor states that the new Controller's position "is an interesting one". Was this made for the purpose of diverting attention from the fact that the executor's position is the *really* interesting one? Having heretofore blown hot, the executor seems to be now blowing cold. It now seeks to substitute the new Controller by attempting to invoke sec. 780 of the U. S. Code, a statute designed to authorize substitution only where the pending suit is really against the office rather than the individual man. The executor further emphasizes its

new and inconsistent position by arguing that "the substitution should be a mere formality as in the innumerable cases where a new Federal Commissioner of Internal Revenue has been substituted as a party respondent in Federal tax suits" (Memo. 6) (which are plainly cases where the pending suit is against the office of Commissioner and not against the individual man); and again by arguing that "the new incumbent of the office is the real party in interest" and that "such cases (*i. e.* where the new Commissioner is substituted) are to be contrasted with the suits against internal revenue collectors for refund of taxes", where "no substitution of a succçessor collector is proper". (Memo. 6.)

It further emphasizes its new position by arguing that "the new Controller has the same interest as his predecessor in claiming the tax and attempting its collection". In view of the Controller's very limited functions in tax proceedings in California it is apparent that the executor cannot mean to say that the new Controller is "claiming the tax" in the sense of claiming *to be entitled* individually to the tax, or that it was to be paid to him as a tax collector. But as one must be claiming "to be entitled" to the tax obligation in order to qualify him as an "adverse claimant" subject to the Interpleader Act, it follows that the executor must have used the words "claiming the tax" in the sense of claiming as a State official or representative that the State is entitled to the tax, and that he must have used the words "attempting its collection" merely in the sense of acting as a State official to represent the State in the pending tax proceedings in the California court. The executor thus now urges substitution on the theory that it is interpleading the office and not the man.

At page 4 the executor asks, "Does he deny . . . that they (the California respondents) were made respondents solely in their capacity as "public officers"? Is

the executor now abandoning its position that it is interpleading these respondents as individuals, stripped of their representative character, and taking the position that the District Court has jurisdiction to interplead them as the agents and representatives of their State to represent the State in the trial of the issues as to the extent of the executor's or the estate's obligation to the State?* If it is, then why the need of any substitution, for the executor would be admitting itself out of court on the main issue raised by the Certiorari proceeding! *Missouri* v. *Fiske,* 290 U. S. 18, 25–28; *In re Ayers,* 123 U. S. 443, 505–6; *Missouri etc. Ry. Co.* v. *Missouri etc. Commissioners,* 183 U. S. 53, 58–9; *Fitts* v. *McGhee,* 172 U. S. 516, 529; *Ex parte State of New York* No. 1, 256 U. S. 490, 500–2; *Monaco* v. *Mississippi,* 292 U. S. 313, 322–324; *Cargile* v. *N. Y. Trust Co.,* 62 F. (2) 585, 587–8, cert. denied, 292 U. S. 625. A state is not a citizen and therefore cannot be interpleaded under the Interpleader Act; and even if that Act had contemplated the impleading of states, either directly or through their representatives, it would violate the Eleventh Amendment.

If the executor now admits that it is attempting to interplead the California respondents in their representative capacity as agents of their State, we submit that the motion to substitute must be denied for the reason that the Interpleader Act does not and could not authorize the interpleader suits against state officials as the representatives or agents of their states.

And finally, we submit that, in any event, the motion

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* It is to be noted in this connection that in any event there is an inheritance tax obligation to the State of California for the decedent owned real estate there (R. 3), and therefore the only question before the District Court on a trial on the merits would be as to the *amount* of that obligation. (Under the Interpleader Act the court "shall discharge the complainant from further liability" for its obligation.)

should be denied on the authority of *Ex parte La Prade*, 289 U. S. 444.

In that case a bill had been brought in a three-judge court to enjoin the Attorney General of Arizona (one Peterson), who had threatened *colori officii* to enforce penalties prescribed by an alleged unconstitutional statute. After the suit had been brought, Peterson's term of office expired, and La Prade then became the Attorney General. The original plaintiffs then made application to the court, under 28 U. S. C. sec. 780 for an order substituting La Prade as party defendant. La Prade appeared specially and objected, but his objection was overruled on the ground that the duty of enforcement was imposed by the statute upon each succeeding attorney general and that so long as there was an attorney general the threat of prosecution was always present and that the resulting injury, if any, always impends. La Prade also filed a motion to dismiss, which was also overruled. An order for substitution was then entered and the court proceeded to hear the bill on its merits, although La Prade declined to participate, and entered a decree that the statute was unconstitutional and enjoined La Prade from enforcing it. La Prade then filed in this Court a petition for a writ of mandamus requiring the three-judge court to dismiss the suit in which he had been substituted.

In holding that the court had no jurisdiction to substitute La Prade this Court pointed out that the suit had been brought against defendant *not* as a representative of the State, but to restrain him individually from enforcing an allegedly unconstitutional act, and that the principle upon which such suits were maintained was that the officer in such a case was "stripped of his official or representative character".

This Court further pointed out that the laws of Arizona did not authorize substitution of La Prade for

his successor, *Irwin* v. *Wright,* 258 U. S. 219, 222; that the suit abated when Peterson ceased to be attorney general; and that, unless empowered by sec. 780, the district court was without jurisdiction to direct that La Prade be substituted. *United States ex rel Bernadin* v. *Butterworth,* 169 U. S. 600, 605; *Shaffer* v. *Howard,* 249 U. S. 200, 201; *Gorham Mfg. Co.* v. *Wendell,* 261 U. S. 1.

"A suit to enjoin a public officer from enforcing a statute is personal and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office." *Irwin* v. *Wright, supra.* The Arizona statute considered in that case and held not to permit substitution of a successor sued personally read as follows:

> "Sec. 461. An action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

The corresponding California statute, § 385 of the Cal. Code of Civil Procedure (Motion, 5), cannot be successfully distinguished. Furthermore, sec. 1004 of the Cal. Pol. Code (Motion, 5) clearly cannot be construed to transfer the personal liability of an officer to his successor.

This court further pointed out in the *La Prade* case that, although the 1925 amendment to sec. 780 (43 Stat. 941) was passed after the *Irwin* case, yet at least as to

state officers it did not purport to authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor.

The mere allegation, not supported by any alleged facts, that Harry B. Riley "has adopted the attitude of his predecessor in office" and that he is "threatening to assess and attempt to collect from the petitioner the" inheritance tax imposed by California tax statutes "upon the estates of California decedents", affords no ground for distinguishing the present case from the *La Prade* case. The only basis for such allegation is set forth at page 5 of the executor's Memorandum. It is that, because the counsel for the three original California respondents opposed Mr. Long's restoration as a party in the Circuit Court of Appeals and opposed the granting of certiorari, and because the same counsel are now representing Harry B. Riley, he "must be held to maintain (through such counsel) the right of the California tax officials to collect the tax imposed by their statute without interference by the Federal Court," and that therefore "it is evident that the successor Controller, Harry B. Riley, has adopted the attitude of his predecessor, Ray L. Riley, and approves the action of the other California respondents." There is nothing in that which amounts to a threatened wrong.

As we have already shown, there is no support for the allegation that he is threatening to assess and attempt to collect the inheritance tax. Only the California court, after hearing all the parties, can fix or assess the tax liability. The new Controller will have nothing to do with the collection of the tax, for that is the function of the County Treasurer, acting for the State. All that the allegation that Harry B. Riley has "adopted the attitude" of his predecessor amounts to is that it must be assumed that he approves the action of Gentry and Sproul in continuing to contest the jurisdiction of the

district court over them, and that, if substituted, he also will contest such jurisdiction. Would that be a dire wrong?

The Inheritance Tax Appraiser is claiming the right to proceed with the taking of testimony and to make his determination and report it to the California Court without being molested or enjoined by the Federal District Court in Massachusetts. The Controller is claiming the right, without similar molestation, to appear in behalf of the State in that court proceeding *after* the report is filed and he is notified hereof, and press whatever contention the State should make at the hearing before that court to determine the estate's tax liability. The Inheritance Tax Attorney is claiming the right, without similar molestation, to act as the official attorney for such Controller in such court proceeding. Surely there can be nothing in any of those "attitudes" to warrant this Court in distinguishing the present case from the *La Prade case*. None of those attitudes involve any threat to deprive the complainant of property without due process of law.

Wherefore it is respectfully submitted that the Motion to Substitute should be denied.

HARRY B. RILEY,

Individually and as Controller of the State of California, appearing specially, only, as aforesaid, by his Attorneys,

NORMAN W. BINGHAM, JR.,
GEORGE S. FULLER.

August, 1937.